A

Tan Ah Kow & Anor v Tan Chaui En

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(NCVC)(W)-233–02 OF 2017
LIM YEE LAN, IDRUS HARUN JJCA AND YEOH WEE SIAM J
2 AUGUST 2017

C *Land Law — Power of attorney — Validity — First appellant signed irrevocable power of attorney — Whether power of attorney void for uncertainty*

Land Law — Sale of land — Agreement — First appellant agreed to sell land to
D *respondent — First appellant transferred land to second appellant for love and affection — Whether there was agreement to sell land*

The respondent and the first appellant were brothers. The first appellant was
E the registered proprietor of three disputed lands and co-owner of 1/3 undivided share of ten other pieces of land, all of which lands were situated in Perak. The respondent alleged that, without written agreement, the first appellant had agreed to sell all the three pieces of land and the respondent had agreed to purchase all three pieces of lands and the first appellant's 1/3 share in the ten pieces of land. The respondent alleged that he had paid the full amount
F of the purchase price for all the 13 pieces of land by way of cash instalments and contra with the sale prices of motorcycles sold by respondent to the first appellant. After full payment was made, the first appellant signed an irrevocable power of attorney ('PA') which was witnessed by an advocate and
G solicitor and then registered at the Ipoh High Court. Subsequently, without knowledge of the respondent, the first appellant transferred the three pieces of land to the second appellant, who was the first appellant's wife, for love and affection. Then, the respondent transferred the respondent's 1/3 share in the ten pieces of land to himself after he lodged a private caveat on the three pieces
H of lands. The learned judicial commissioner allowed the claim of the respondent and dismissed the appellant's counterclaim with costs, hence, the appeal. The issues to be determined were whether: (a) there was agreement to sell all the 13 pieces of land; (b) PA was void for uncertainty; and (c) the 13 pieces of land constitute valuable consideration under the PA to render the PA
I irrevocable, and for the PA to be accepted as sale and purchase agreement ('the SPA').

Held, allowing the appeal with costs; setting aside the order of High Court; and allowing the appellants' counterclaim:

(1) The trial judge should first of all determine, on a balance of probabilities, whether the plaintiff had discharged the burden of proving his case. Then, it would be considered by the trial judge, and taking into account at the same time the demeanour and credibility of the witnesses that should not be accorded such disproportionate weight by the trial judge to the extent of ignoring and not giving due weight and importance of the facts established from the totality of the evidence (see para 20).

(2) On the totality of evidence, there was no evidence of an oral agreement to sell the first appellant's 1/3 share in the ten pieces of land and the other three pieces of land. The invoices by themselves did not prove payment of the purchase price to the first appellant. In commercial transactions, invoices were billing documents, but they were not receipts and thus could not be used as proof of payment. Furthermore, there was no delivery order produced by respondent to show that the first appellant had taken delivery of the motorcycles from the respondent. Hence, the unilateral documents of the respondent purporting to show payments were of no probative value to prove actual payment made by him of the purchase price (see paras 21 & 25–27).

(3) Although the PA came under the ambit of the Power of Attorney Act 1949, it was the Contracts Act 1950 which applied here in view of the respondent's contention that the PA could be treated as the alleged SPA reduced in writing. Thus, the PA could not stand as it had vague terms and discrepancy of definitions. It was void for uncertainty and could not be accepted as a SPA (see paras 40–41).

(4) The respondent failed to prove that the PA was evidence of the alleged SPA that was agreed upon by both parties, or that the SPA was legally binding. The PA ought to be construed strictly and squarely within the same document itself without taking into account any parole evidence, or other extraneous evidence. Thus, the learned JC erred in dismissing the appellant's counterclaim to declare the PA null and void being given for no valuable consideration (see para 43).

[Bahasa Malaysia summary

Responden dan perayu pertama adalah adik-beradik. Perayu pertama adalah pemilik berdaftar tiga tanah yang dipertikaikan dan pemilik bersama 1/3 syer yang tidak dibahagikan ke atas sepuluh keping tanah, yang mana semua tanah tersebut terletak di Perak. Responden mendakwa, tanpa perjanjian bertulis, perayu pertama bersetuju untuk menjual ketiga-tiga keping tanah dan responden bersetuju untuk membeli ketiga-tiga keping tanah dan 1/3 syer ke atas sepuluh keping tanah perayu pertama. Responden mendakwa dia telah membayar jumlah penuh harga belian kesemua 13 keping tanah secara ansuran tunai dan kontra dengan harga jualan motosikal-motosikal yang dijual oleh responden kepada perayu pertama. Selepas bayaran penuh dibuat, perayu

A pertama telah menandatangani surat kuasa wakil tidak boleh dibatalkan ('PA') yang telah disaksikan oleh seorang peguambela dan peguamcara dan telah didaftarkan di Mahkamah Tinggi Ipoh. Kemudiannya, tanpa pengetahuan responden, perayu pertama telah memindahkan tiga keping tanah kepada perayu kedua, yang mana adalah isteri perayu pertama, atas dasar kasih sayang. B Responden kemudiannya memindahkan 1/3 syer responden di dalam sepuluh keping tanah kepada dirinya selepas memasukkan kaveat persendirian ke atas ketiga-tiga keping tanah tersebut. Pesuruhjaya kehakiman membenarkan tuntutan responden dan menolak tuntutan balas perayu dengan kos maka rayuan ini. Isu-isu untuk ditentukan adalah sama ada: (a) terdapat perjanjian C untuk menjual kesemua 13 keping tanah tersebut; (b) PA adalah batal kerana keidakpastian; dan (c) 13 keping tanah membentuk balasan bernilai di bawah PA untuk menyebabkan PA tidak boleh dibatalkan, dan untuk PA diterima sebagai perjanjian jual beli ('PJB').

D

Diputuskan, membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi; dan membenarkan tuntutan balas perayu-perayu:

(1) Hakim bicara sepatutnya terlebih dahulu menentukan, atas imbangan kebarangkalian, sama ada plaintif telah melepaskan beban membuktikan E kesnya. Kemudian, ia akan dipertimbangkan oleh hakim bicara, dan mengambil kira pada masa yang sama perilaku dan kredibiliti saksi-saksi yang tidak patut diberikan berat yang tidak seimbang oleh hakim bicara ketahap tidak memperdulikan dan tidak memberi berat dan kepentingan fakta yang sepatut diberikan terhadap yang dibuktikan daripada F keseluruhan keterangan (lihat perenggan 20).

(2) Atas keseluruhan keterangan, tidak terdapat keterangan perjanjian lisan untuk menjual 1/3 syer perayu pertama dalam sepuluh keping tanah dan tiga keping tanah yang lain. Invois-invois dengan sendirinya tidak G membuktikan bayaran harga belian kepada perayu pertama. Dalam transaksi komersial, invois-invois adalah dokumen bil, tetapi ia bukan resit dan oleh itu tidak boleh digunakan sebagai bukti bayaran. Selanjutnya, tidak terdapat perintah penghantaran yang dikemukakan oleh responden untuk menunjukkan bahawa perayu pertama telah H menerima motosikal-motosikal daripada responden. Maka, dokumen unilateral responden yang bermaksud untuk menunjukkan bayaran tidak mempunyai nilai probatif untuk membuktikan bayaran sebenar dibuat olehnya terhadap harga belian (lihat perenggan 21 & 25–27).

I (3) Walaupun PA terangkum di bawah skop Akta Surat Kuasa Wakil 1949, ia adalah Akta Kontrak 1950 yang mana digunakan di sini mengambil kira hujahan responden bahawa PA boleh dianggap sebagai PJB yang didakwa diturunkan secara bertulis. Oleh itu, PA tidak boleh bertahan kerana ia mempunyai terma yang kabur dan percanggahan definisi. Ia

adalah batal kerana ketidakpastian dan tidak boleh diterima sebagai PJB (lihat perenggan 40–41).

(4) Responden gagal untuk membuktikan bahawa PA adalah keterangan terhadap PJB yang didakwa yang dipersetujui oleh kedua-dua pihak, atau bahawa PJB adalah mengikat secara sah. PA patut ditafsirkan secara ketat dan tepat dalam dokumen yang sama itu sendiri tanpa mengambil kira apa-apa keterangan parol, atau keterangan luaran yang lain. Oleh itu, PK yang bijaksana tersilap dalam menolak tuntutan balas perayu untuk mengisytiharkan PA adalah tak sah dan batal kerana tidak diberikan pertimbangan bernilai (lihat perenggan 43).]

Notes

For a case on validity, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 4400.
For cases on agreement for sale of land, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4946–4950.

Cases referred to

Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah [2007] 2 MLJ 746; [2007] 1 CLJ 498, CA (refd)
Malaysian Building Society Bhd v Johore Mining and Stevedoring Co Sdn Bhd [2004] 5 CLJ 82, HC (refd)

Legislation referred to

Contracts Act 1950 s 30
Evidence Act 1950 ss 101, 102, 103
National Land Code s 340
Power of Attorney Act 1949 s 6

Appeal from: Civil Suit No 22NCVC-138–12 of 2015 (High Court, Ipoh)

Wan Azmir bin Wan Majid (Emelia Iszeham and Caleb Goh Hern-Ee with him) (Hafarizam Wan & Aisha Mubarak) for the appellants.
Mohamed Hanipa bin Maidin (Aminuddin bin Zulkipli with him) (Amin Amirul & Partners) for the respondent.

Yeoh Wee Siam J:

INTRODUCTION

[1] This is an appeal by the defendants/appellants ('the appellants') regarding the decision of the learned judicial commissioner ('JC') in the Ipoh High Court, dated 13 March 2017, in allowing the claim of the plaintiff/respondent ('the respondent') against the appellants, and dismissing

A the appellants' counterclaim against the respondent, with costs of RM20,000 subject to payment of the allocatur fee.

BACKGROUND FACTS

B **[2]** The respondent and the first appellant are brothers. At the material time, the first appellant was the registered proprietor of three disputed lands namely GM 3249 Lot 2120, GM 3250 Lot 2121 and GM 3251 Lot 2122 ('the three pieces of land'), and co-owner of 1/3 undivided share ('1/3 share') of ten other pieces land, namely GM 2725 Lot 2041, GM 1579 Lot 2043, GM 1578 C Lot 2040, GM 1577 Lot 2039, GM 1580 Lot 2044, GM 1581 Lot 2042, GM 1584 Lot 2021, GM 1585 Lot 2022, GM 2726 Lot 2023, GM 1575 Lot 2024 ('the ten pieces of land'), all of which lands are situated at Mukim Slim Tempat Sungei Sempa in the district of Muallim, Perak.

D

[3] The respondent alleged that sometime in 2003, without any written agreement, the first appellant had agreed to sell and the respondent had agreed to buy all the three pieces of land and the first appellant's 1/3 share in the ten pieces of land at a total purchase price of RM420,000 ('purchase price') (the E three pieces of land and the first appellant's 1/3 share in the ten pieces of land are hereinafter collectively referred to as 'the 13 pieces of land').

[4] The respondent alleged that he had paid the full amount of the purchase price for all the 13 pieces of land by way of cash instalments, and contra with F the sale price of motorcycles sold by the respondent to the first appellant, starting from 2003–2005.

[5] The respondent contended that after he had paid fully the purchase price for the 13 pieces of land to the first appellant, on 25 July 2006 the first G appellant signed an irrevocable power of attorney ('PA') (exh 1, *RR Bhg C Jld* 4/4 pp 381–388) which was witnessed by an advocate and solicitor, SP1. The PA was duly registered at the Ipoh High Court.

H **[6]** Without the knowledge of the respondent, on 1 July 2015 the first appellant transferred the three pieces of land to the second appellant, who is the first appellant's wife, without any valuable consideration, but for love and affection. However, the first appellant did nothing to the ten pieces of land.

I **[7]** On 9 July 2015, the respondent lodged a private caveat ('the caveat') on the three pieces of land. Besides that, on 28 July 2015 and 31 July 2015, the respondent transferred the first appellant's 1/3 share in the ten pieces of land to himself.

[8] On 18 November 2015, the Ipoh High Court ordered that the caveat be maintained until the disposal of the respondent's suit.

[9] On 9 January 2017, the learned JC allowed the respondent's claim as stated in para 16 of the statement of claim ('SOC'), and dismissed the appellants' counterclaim.

THE RESPONDENT'S CLAIM

[10] In para 16 of the SOC (*RR Bhg A Jld* 1/4) pp 22–30 and at pp 29–30), the respondent applied for the following orders:

(i) Perintah Pengisytiharan bahawa pindahmilik hartanah-hartanah GM 3249 Lot 2120, GM 3250 Lot 2121 dan GM 3251 Lot 2122, kesemuanya di Mukim Slim, Daerah Batang Padang, Negeri Perak kepada Defendan Ketua adalah tidak sah dan pendaftaran pindahmilik tersebut telah dibuat dengan bersandarkan instrument pindahmilik yang tidak lengkap;

(ii) Dalam keadaan perintah (a) dibenarkan, satu perintah bahawa pindahmilik tersebut diketepikan;

(iii) Satu Perintah pengisytiharan bahawa Plaintif adalah pembeli yang sah dan pemilik benefisial hartanah-hartanah tersebut;

(iv) Satu Perintah yang memerintahkan Defendan Pertama untuk menandatangani Borang 14A dan dokumen-dokumen pindahmilik berkenaan yang lain bagi tujuan memindahmilikkan hartanah-hartanah tersebut kepada Plaintif;

(v) Secara alternative, jika Defendan Pertama gagal mematuhi perintah dalam perenggan (iv) diatas dalam tempoh empat belas hari dari tarikh ia diarahkan, Pentadbir Tanah dan Daerah Batang Padang/Slim River diberi kuasa untuk menandatangani Borang 14A tersebut dan lantas menyempurnakan secara sah pindahmilik tersebut;

(vi) Kos atas dasar peguamcara klien; dan

(vii) Perintah atau relif-relif lain yang difikirkan adil dan suaimanfaat untuk diberikan oleh Mahkamah Yang Mulia ini.

THE APPELLANTS' COUNTERCLAIM

[11] In the appellants' counterclaim against the respondent in the re-amended defence and counterclaim ('the counterclaim') (*RR Bhg A Jld* 1/4 pp 31–48 at pp 44–47 para 20(a)–(q)), the appellants applied, inter alia, for the following orders:

(1) A declaration that the PA is null and void;

(2) In the alternative, a declaration that the PA was not given for a valuable consideration and not irrevocable;

(3) A declaration that the first appellant retains the power as registered owner of the three pieces of land and is entitled to transfer the three pieces of land to the second appellant;

(4) In the alternative, a declaration that the first appellant did not lose the power to manage and to transfer the three pieces of land despite the existence of the PA;

(5) A declaration that the transfer of the three pieces of land by the first appellant to the second appellant is valid and the second appellant remains as the registered proprietor of the three pieces of land;

(6) An order that the respondent re-transfers the first appellant's 1/3 share in the ten pieces of land to the first appellant;

(7) An order that the caveat lodged by the respondent on the three pieces of land be removed and invalidated immediately; and

(8) An order for damages to be assessed.

THE DECISION OF THIS COURT

[12] On 11 May 2017, after having heard the submissions of respective learned counsels and perused the records of appeal, this court made a unanimous decision. We found merits in the appeal. Accordingly, we allowed the appeal with costs and set aside the order of the High Court in regard to the respondent's claim, and allowed the appellants' counterclaim. We fixed agreed costs at RM20,000 subject to payment of the allocatur fee. The deposit is to be refunded to the appellant.

[13] Consequently, learned counsel for the appellants withdrew their application for stay in encl 5a which was fixed for hearing on 25 May 2017. We therefore struck off encl 5a with no order as to costs.

GROUNDS FOR OUR DECISION

No agreement to sell the 13 pieces of land

[14] The learned JC, in her judgment (*RRT* pp 11–23) at para [17] stated that learned counsel for the respondent had conceded that there was no formal sale and purchase agreement ('SPA') signed between the respondent and the first appellant. However, the learned JC went on to conclude that there was an oral SPA between the parties. This is what she stated in the same paragraph:

> ... the parties had acted in such a way to support the contention there was in fact an oral sale and purchase agreement between them with the following acts:

(a) the surplus of payment in the amount of RM5,316 which the first defendant had returned back to the first plaintiff. This can be gathered from the evidence of SP2 that SD1 had deposited RM5,316 into his account (exh P31 (bank in slip));

(b) even though the said contra (motorcycles) were made to a business (sole proprietorship), but the said business belongs to the first defendant and hence the first defendant and the business are one and the same entity. And the first defendant didn't deny receiving all those motorcycles; and

(c) after all the said payment were made in full, the first defendant had signed an irrevocable power of attorney ('PA') giving the plaintiff the right to deal with all the above 13 pieces of land.

The learned counsel submitted that from the above acts, the first defendant has constructively admitted that payment of RM420,000 were indeed received from the plaintiff.

[15] The learned JC relied on the case of *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746; [2007] 1 CLJ 498 per Gopal Sri Ram JCA (delivering the judgment of the court) where he held:

> On the facts, there was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant and acceptance by the plaintiff, and there was consideration, certainty of parties, certainty of price and property. Also, there were the unequivocal acts of part performance by the plaintiff which were referable to an existing contract between the parties ... Although it was true that no formal contract of sale and purchase was ever executed, that did not matter since there could be a concluded contract even where the parties contemplated the execution of a more formal document ... The defendant's own evidence that the defendant would readily accept the balance of the purchase price even without a formal agreement being executed by the parties pointed to the formal agreement being an unimportant document to the contracting parties. So, objectively speaking, the parties had already made a contract ...

[16] Notwithstanding the fact that there was no evidence of any oral or written agreement between the respondent and the first appellant for the purchase of the 13 pieces of land, the learned JC erred by concluding that that return of the alleged surplus payment of RM5,316 by the first appellant to the respondent, and the contra payment with motorcycles supplied by the respondent to the first appellant's business (and not to the first appellant personally) are all proof of full payment of the purchase price of the 13 pieces of land. The learned JC erred by concluding that any alleged contra payments with the supply of motorcycles by the respondent's business/sole proprietorship ('business enterprise') to the first appellant's business enterprise are payments towards the purchase price of the 13 pieces of lands when such payments were not made by the respondent personally to the first appellant personally, but instead were payments made in respect of business transactions.

[17] We observe that throughout her judgment, the learned JC was swayed by her assessment of the demeanour of the first appellant and the respondent as witnesses before her. She stated the following:

> [20] I find that the plaintiff was very frank and consistent while giving his evidence in court. When he was asked why didn't he entered a normal SPA agreement with the first defendant if he truly has bought the thirteen (13) pieces of land from the first defendant, the plaintiff was very frank when he said that was to avoid paying tax.
>
> ...
>
> [22] On the other hand, I find SD1 to be a very evasive witness. He admitted that he is the sole proprietor of Syarikat Motor Lee Hin. According to SD1 he gave his father money to pay for the three pieces of land and his father gave the right (*beri kuasa*) to him and his brothers (three brothers including the first defendant). When he was further crossed that he can't be the only person who has paid for the land, SD1 took the easy way out and said he can't remember. SD1 admitted that he knew the titles to the three pieces of land was with the plaintiff but he nevertheless lodged a police report (exh P34) to say that the title to the three pieces of land was lost. When it was put to him that he lied in his report, SD1 disagreed. When he was asked regarding the payment of RM5,316 which the plaintiff alleged as a surplus returned by him, SD1 answered that he can't remember. Regarding the invoice and the supply of motorcycles, SD1 admitted that the name on the invoice was his business but he denied ever receiving the motorcycles. His inconsistency and evasive demeanour during the giving of his evidence affect his credibility as a witness.
>
> [23] I find that SD1 was very evasive and not consistent in giving evidence. For example, when it was put to him that even though he admitted and knew that the titles to the three pieces of land was with the plaintiff but he nevertheless sought to manipulate the system and proceeded to lodge a police report claiming the titles were lost and with that report he secured copies of the required titles to enable him to transfer the three pieces of land to his wife. On this issues alone it is clear that SD1 is not a credible nor a reliable witness.
>
> [24] *In this case, the conclusions reached mostly depended on the credibility and demeanour of the witnesses and the impression formed by me based on the believability of the evidence of the witnesses*. I find that SD1 admitted that he had transferred the three pieces of land to his wife 9 years after executing the said PA in favour of the plaintiff. In the circumstances I hold that there was in fact an oral SPA between the plaintiff and the first defendant. I hold so because the titles of the thirteen (13) pieces of land were given to the plaintiff as admitted by the first defendant. The said PA was signed three years after the full payment (by cash/contra) was made to the first defendant. This fact support the contention of the plaintiff that the said PA was signed after the full payment was made. (Emphasis added.)
>
> (Note: SD1 refers to the first appellant).

[18] Regarding paras [22] and [23] of the judgment of the learned JC, we are of the view that the learned JC did not have adequate judicial appreciation of the facts. According to the evidence of the first appellant and para 34 of his

re-amended defence (*RR Bhg A Jld* 1/4 p 34), the first appellant had gone to see the respondent to ask for the land titles of the three pieces of land. However, when he was informed by the respondent that the land titles were not with him, the first appellant then lodged a police report to enable him to apply to the land office for the duplicate titles of the three pieces of land. Thus, it was wrong of the learned JC to conclude that on this issue alone the first appellant is not a credible nor a reliable witness.

[19] As for the first appellant's answer during cross-examination that he could not remember if he was the only one who had paid for the three pieces of land, we do not think that based on that answer, the learned JC should form the opinion that the first appellant is not a credible witness. The more important fact that the learned JC ought to have considered is that in the land titles, the first appellant is the registered owner of the three pieces of land and that is not disputed by the respondent.

[20] Having considered the judgment of the learned JC, we are of the view that the learned JC erred in making her decision based mainly on the demeanour of the first appellant, and the learned JC's perception of the lack of credibility of the first appellant. We agree that demeanour and credibility are important in determining which of the two versions of the parties can be believed and accepted. However, we are of the view that the trial judge should first of all determine, on a balance of probabilities, whether the plaintiff has discharged the burden of proving his case. This will then be considered by the trial judge, and taking into account at the same time the demeanour and credibility of the witnesses. The demeanour and credibility of witnesses should not be accorded such disproportionate weight by the trial judge to the extent of ignoring and not giving due weight and importance to the facts established from the totality of the evidence.

[21] We agree with the submission of learned counsel for the appellants that based on the totality of the evidence adduced before the High Court, there is no evidence of an oral agreement to sell the 1/3 share of the first appellant in the ten pieces of land and the other three pieces of land, which were wholly owned by the first appellant, to the respondent at a purchase price of RM420,000.

[22] In our considered view, the findings of the learned JC that there was full payment made by the respondent to the first appellant are not supported by the evidence at all.

[23] In para 8 of the SOC, the respondent pleaded that he had made the payment to the first appellant towards the purchase price of RM420,000 for the purchase of the 13 pieces of land as follows:

BIL	TARIKH	JUMLAH (RM)/INVOIS
1	27/02/2003	RM30,000
2	06/03/2003	RM30,000
3	11/04/2003	RM40,000
4	19/05/2003	RM10,000
5	16/06/2003	RM10,000
6	15/07/2003	RM10,000
7	15/08/2003	RM10,000
8	23/09/2003	RM10,000
9	15/10/2003	RM10,000
10	24/11/2003	RM10,000
11	12/12/2003	RM10,000
12	08/03/2004	RM12,000
13	10/03/2004	RM8,000
14	08/03/2005	RM35,839/INVOIS 1708,1709,1710, 1714 & 1732
15	24/03/2005	RM23,839/INVOIS 1739
16	25/03/2005	RM27,954/INVOIS 1740
17	29/03/2005	RM20,000
18	20/04/2005	RM23,861/INVOIS 1741
19	20/04/2005	RM6,578/INVOIS 1742
20	04/05/2005	RM10,000
21	04/05/2005	RM28,738/INVOIS 1744
22	05/06/2005	RM10,000
23	05/07/2005	RM10,000
24	05/07/2005	RM28,507/INVOIS 1756
25	09/09/2005	RM5,316 (dipulangkan kepada Plaintif)
JUMLAH		**RM420,000**

[24] The learned JC erred by not considering the fact that the bank statements exhibited by the respondent are actually not the bank statements of the respondent personally, but of the respondent's business enterprise, namely Lee Hin Motor Auto Parts Enterprise (*RR Bhg C Jld* 4/4 pp 357, 359–360, 370, 373 and 376–377). Therefore, the bank statements do not reflect the respondent's personal bank transactions. Nowhere in the bank statements is it stated that the cheque payments by Lee Hin Motor Auto Parts Enterprise are paid to the first appellant for the respondent's purchase of the 13 pieces of land.

[25] The respondent exhibited some invoices to prove his payments to the first appellant ('exhs P2(a)–P31') for the purchase of the 13 pieces of land. The respondent contended that he had also paid the first appellant for the said purchase by way of contra with the sale of motorcycles by the respondent to the first appellant. However, the learned JC failed to consider that the invoices by

themselves do not prove payment of the purchase price to the first appellant. In commercial transactions, invoices are billing documents, but they are not receipts and thus cannot be used as proof of payment.

[26] The respondent did not produce any other contemporaneous documents to support his claim based on the invoices. There is no proof of any purchase order given by the first appellant to the respondent. The first appellant denied having received any motorcycles by way of contra from the respondent. The learned JC further failed to take note of the fact that there were no delivery orders produced by the respondent to show that the first appellant had taken delivery of the motorcycles from the respondent. Thus, it is clear that the respondent was unable to prove his payment to the first appellant by contra with the motorcycles as he had pleaded in the seven items stated as 'invois' in the above table in para 8 of the SOC.

[27] There is therefore no proof at all by the respondent that from 27 February 2003–10 March 2004 he had paid RM200,000, and from 24 March 2005–5 July 2005 he had paid RM50,000 in the form of cheques, and RM170,000 in the form of contra with motorcycles supplied to the first appellant for the purchase price of the 13 pieces of land.

[28] We agree with the submission of learned counsel for the appellants that the unilateral documents of the respondent purporting to show payments are of no probative value to prove actual payment by him of the purchase price.

The PA is void for uncertainty

[29] In the absence of a written SPA, apart from relying on the purported oral agreement to purchase the 13 pieces of land from the first appellant, the respondent also relied on the PA (exh P1, *RR Bhg C Jld* 4/4 pp 381–388) executed by the first appellant three years after the alleged full payment of the purchase price of the 13 pieces of land to the first appellant.

[30] The first appellant contended that he had executed the irrevocable PA to appoint the respondent as his attorney for the 13 pieces of land since he was busy with his business in Kuala Lumpur, and the lands are in Slim River where the respondent was residing. The first appellant's intention for executing the PA is to get the assistance of the respondent to manage the lands. The first appellant did not intend to sell the 13 pieces of land to the respondent. In any case, the first appellant contended that the purported purchase price of RM420,000 for the 13 pieces of land is far below the actual value of the lands. In our view, this evidence ought to have been considered and given due weight by the learned JC.

[31] The appellants contended that the PA cannot be accepted as a SPA for lack of valuable consideration. Without any valuable consideration, the PA is also not an irrevocable PA which allows the respondent to transfer the 13 pieces of land to himself.

[32] In *Malaysian Building Society Bhd v Johore Mining and Stevedoring Co Sdn Bhd* [2004] 5 CLJ 82, the High Court has defined consideration to be any right, interest, profit or benefit on one party, or a detriment, loss or responsibility given or undertaken by the other.

[33] Section 6 of the Power of Attorney Act 1949 provides as follows:

> 6 Powers Of Attorney Given for valuable Consideration
>
> (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser —
>
> (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; ...

[34] The respondent, however, contended that the PA given by the first appellant to him in respect of the 13 pieces of lands is irrevocable and he had acted lawfully under the PA to transfer the lands to himself after having paid fully the purchase price.

[35] We note that the recital of the PA at its first page states that the first appellant appoints the respondent to be his attorney 'only in respect of the following properties'. Thereafter, the 13 pieces of land were listed in paras (a)–(m) of the PA.

[36] Paragraph 21 of the PA states as follows:

> 21. This Power of Attorney under all circumstances is IRREVOCABLE as the Attorney/Donee has purchased *the said Land* for a valuable consideration and is irrevocable also in the event of death. (Emphasis added.)

[37] The question is whether the 13 pieces of land constitute valuable consideration under the PA to render the PA irrevocable, and for the PA to be accepted as a SPA.

[38] We observe that the words 'the said Land' in para 21 of the PA do not make any specific reference to the 13 pieces of land which have been described as 'properties' in the recital of the PA. Furthermore, there is no mention in the

PA of any valuable consideration being given by the respondent to the first appellant if indeed the purpose of the PA is to serve as a SPA between the parties, as alleged by the respondent.

[39] We agree with the submission of learned counsel for the appellants that although the PA comes under the ambit of the Power of Attorney Act 1949, it is the Contracts Act 1950 which applies here in view of the respondent's contention that the PA can be treated as the alleged SPA reduced in writing.

[40] Therefore, as submitted by learned counsel for the appellants, the PA cannot stand as it has vague terms and discrepancy of definitions. It is void for uncertainty. This is clearly provided in s 30 of the Contracts Act 1950 as follows:

> Agreements, the meaning of which is not certain, or capable of being made certain, are void.

[41] Due to the uncertainty of its terms, in our view, the PA cannot be accepted as a SPA.

[42] We further find that the learned JC erred by not considering that if it is true, as alleged by the respondent, that the first appellant gave the PA to the respondent after the respondent had paid fully the purchase price, then it is highly improbable and hard to believe that the respondent did nothing for nine years after he was appointed as attorney under the PA to transfer the ten pieces of land to himself. He only did so after he had discovered that the first appellant had transferred the three pieces of land to the second appellant.

[43] The respondent has therefore failed to prove that the PA is evidence of the alleged SPA that was agreed upon by both parties, or that the SPA is legally binding at all. The learned JC erred in deciding that the alleged SPA could be inferred from the circumstances surrounding the PA. The learned JC should not have accepted the oral evidence of SP1, the advocate and solicitor who attested the PA, that 'the said Land' refers to the 13 pieces of land. In our view, the PA ought to be construed strictly and squarely within the same document itself without taking into account any parole evidence, or other extraneous evidence, in particular the oral evidence of SP1 in interpreting the provisions of the PA based on her own explanation or opinion. Therefore, the learned JC erred in dismissing the appellants' counterclaim to declare the PA null and void being given for no valuable consideration.

[44] Since there is no proof of full payment of the purchase price, the respondent has no beneficial interest in the 13 pieces of land. The respondent

has no right to use the PA, which is not an SPA, to transfer the first appellant's 1/3 share in the ten pieces of land to himself.

CONCLUSION

[45] On the whole, the learned JC erred by not considering that in the absence of any agreement, whether oral or in writing, by the first appellant to sell the 13 pieces of land to the respondent, and without any concrete evidence of payment by the respondent to the first appellant of the purchase price for the 13 pieces of land, the respondent has not discharged his burden of proving his case under ss 101, 102 and 103 of the Evidence Act 1950. The learned JC also failed to consider that without proof of the respondent's claim, the first appellant, who is the registered proprietor of the three pieces of land, is entitled to transfer the same to the second appellant. Pursuant to such valid transfer by the first appellant, the second appellant has now obtained indefeasibility of title to such lands under s 340 of the National Land Code.

[46] For the above reasons, we therefore find merits in the appeal which warrant appellate intervention. In the premises, we accordingly allowed the appeal with costs.

Appeal allowed with costs; order of High Court set aside and; appellants' counterclaim allowed.

Reported by Jacqueleen Kho